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No. 84-1380

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRED W. ALLNUTT, SR.,

Appellant,

v.

STATE OF MARYLAND,

Appellee.

ON APPEAL FROM THE COURT OF
SPECIAL APPEALS OF MARYLAND

MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO AFFIRM

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STATE OF MARYLAND,

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ON APPEAL FROM THE COURT OF

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MOTION TO DISMISS OR,
IN THE ALTERNATIVE,
MOTION TO AFFIRM

Pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States, Appellee moves

the Court to dismiss the appeal herein on the grounds that the federal question was not timely or properly raised and was not expressly passed on, and that the appeal does not present a substantial federal question, as hereinafter set forth. In the alternative, Appellee moves that this Court affirm the judgment of the State court for want of a substantial federal question.

PERTINENT STATUTORY PROVISIONS

In addition to the provisions reprinted in Appellant's jurisdictional statement, Appellee submits the following provision as relevant: Md. Ann. Code (1980 Repl. Vol.), Art. 81, §325(a):

> "(a) For the privilege of selling certain tangible personal property at retail as defined above and for the privilege of dispensing certain selected services as defined as sales at retail by §324(f) of this subtitle a vendor shall collect from the purchaser a tax at the rate specified in this section on the price of each separate retail sale made in this State. The tax imposed by this section shall be paid by the purchaser and shall be computed subject to the terms and conditions of §334 of this subtitle, as follows: . . . ."

STATEMENT OF FACTS

This is an appeal from an affirmance by the Maryland Court of Special Appeals of Appellant's conviction for nine counts of willful failure to file retail sales tax returns, willful failure to pay retail sales tax, and willful failure to file a Maryland income tax return in 1981. Allnutt v. State, 59 Md. App. 694, 478 A.2d 321, cert. denied, 301 Md. 639, 484 A.2d 274 (1984).

Appellant raised no pre-trial motions challenging the validity of any state statute. Rather, he introduced evidence at trial concerning alleged conflicts between federal statutes relating to money and to federal reserve notes. Additionally, Appellant produced testimony on Article I, §10 of the United States Constitution concerning the authority of the State to require an accounting for tax purposes and payment of taxes in any tender other than that backed by gold or silver. The thrust of Appellant's defense was that the confusion caused by conflicts in federal

law concerning federal reserve notes made his failure to file or pay taxes other than "willful." Nevertheless, Appellant was convicted on all counts.

On appeal to the Maryland Court of Special Appeals, Appellant raised the following issues:

1. Considering that there was testimony throughout the case concerning Article 1, §10 of the Constitution, the statute declaring the federal policy of a monetary system based on a parity with gold and silver and the exemption of obligations of the United States from taxes, did the Trial Judge err in not instructing the jury on the law relating to such issues?

2. When there was evidence of contradictory federal statutes and constitutional provisions regarding monetary issues raised in the case and when the State used such contradictions in its closing argument, did the Trial Judge err by instructing the jury that the law was clear and the jury was only to judge the facts in the case?

3. Given the contradictory federal statutes on the monetary system, as well as Appellant's undenied good faith attempts to seek advice from the State on such issues before filing a return, was the

evidence sufficient to convict Appellant of a willful failure to file and pay?

Finding sufficient evidence to convict and no procedural error, the Court of Special Appeals affirmed the convictions. A petition for writ of certiorari to the Maryland Court of Appeals was denied on December 4, 1984.

ARGUMENT

A.

BECAUSE THE ISSUE RAISED WAS "NOT PRESSED OR PASSED UPON BELOW," THE APPEAL SHOULD BE DISMISSED.

Appellant has noted this appeal under 28 U.S.C. §1257(2). In order for appellate jurisdiction to be invoked under that subparagraph it is necessary that the validity of a State statute be "drawn in question" on the basis of repugnancy to the constitution, treaties or laws of the United States, with the ultimate decision being in favor of the statute's validity. While, arguably, the question presented by Appellant here draws into question the validity of a state statute on constitutional grounds (although no statute is

designated as being repugnant in Appellant's jurisdictional statement) the question has not previously been properly raised in any state forum and no decision has been rendered by any Maryland court. As a result, the appeal should be dismissed. Rules of the United States Supreme Court, Rule 16(1)(b).

In Illinois v. Gates, 462 U.S. 213, __, 103 S. Ct. 2317, 2321-22, 76 L.Ed.2d 527, 535 (1983), this Court quoted its earlier decision in McGoldrick v. Compagnie Generale, 309 U.S. 430, 436 (1940):

> "In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that

> this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court."

Similarly, in Cardinale v. Louisiana, 394 U.S. 437, 438 (1969), this Court stated:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet. 368, 9 L.Ed. 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344, 3 L.Ed. 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, . . . and since . . . ."

As noted in the Statement of Facts, supra, and as readily discernable from a review of the opinion of the

Court of Special Appeals (Juris. Stat., A.1-A.17), the questions presented for appellate review in the state court did not draw into question the validity of the state statute. Rather, the appellate issues presented to the state court involved: (1) whether the jury should have been instructed on federal law; (2) whether the jury should have been instructed that they were the judges of the law in accordance with Article 23 of the Maryland Declaration of Rights due to the "conflict" in federal law; and (3) the sufficiency of the evidence. The "conflict" referred to in (2) above was not between state and federal law, but was alleged to be within the federal law alone. Moreover, the issue presented here could not have been raised through the request for an instruction in accordance with Md. Decl. of Rights, Article 23, because that provision does not place questions of constitutionality in the hands of the jury. Giles v. State, 229 Md. 370, 383, 183 A.2d 359, 365 (1962), app. dis. 372 U.S. 767 (1963).

In Street v. New York, 394 U.S. 576, 584 (1969),

this Court quoted its earlier decision in New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928), as follows:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time."

In this case, the issues presented by Appellant to the Maryland courts have not properly drawn into question the validity of any state statute. His appeal should accordingly be dismissed.

B.

BECAUSE THIS APPEAL FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION, THE APPEAL SHOULD BE DISMISSED, OR IN THE ALTERNATIVE, THE JUDGMENT SHOULD BE AFFIRMED.

Assuming arguendo that the question presented on appeal here had been presented to the State court, and further assuming arguendo that the question

presented draws into question the validity of a state statute, the appeal, nevertheless, should be dismissed or, in the alternative, affirmed for want of a substantial federal question.

In Equitable Life Assurance Society of the United States v. Brown, 187 U.S. 308, 311 (1902), it was stated:

> "[I]t is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. 'There must be a real substantive question on which the case may be made to turn,' that is, 'a real, and not a merely formal, Federal question is essential to the jurisdiction of this court'. Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail. New Orleans Water-works Company v. Louisiana, 185 U.S. 336, 345, 46 L.Ed. 936, 941, 22 S.Ct. Rep. 691, and authorities

> there cited. . . . It has also been decided by this court that even where the motion to dismiss is denied, and where such motion should be treated as without color, considering alone the formal making of such question, yet notwithstanding the provisions of subdivision 5 of rule 6, the power to consider and sustain a motion to affirm obtains where the assignments of error on the merits are obviously and unquestionably frivolous, or when it is patent that the writ of error has been prosecuted for mere delay, or where it is evident on the face of the record that the question on the merits is not open to possible contention because it has previously been so specifically and adversely ruled on by this court as to absolutely foreclose further contention on the subject."

See also Zucht v. King, 260 U.S. 174, 176 (1922) ("although the validity of a law was formally drawn in question, it is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not, and was not at the time of granting the writ, substantial in character," citing Sugarman v. United States, 249 U.S. 182, 184 (1919)).

It is immediately apparent that no substantial

federal question is presented by the instant appeal. Appellant questions the validity of a statute requiring "payment of taxes in irredeemable federal reserve notes where such taxes are 'debts' as defined by State statutes" (Juris. Stat. at p. i). Yet, all but one of Appellant's convictions were for failure to file returns; his failure to pay income tax was not prosecuted. The one conviction relating to payment involved Appellant's failure to remit sales tax to the State that he collected on behalf of the State. See, Article 81, §325(a), Md. Ann. Code (1980 Repl. Vol.). The "debt" provisions set forth by Appellant become operative only after the tax has become due and payable. See Art. 81, §342(a). Thus, had Appellant timely remitted to the State the funds collected from the purchasers no "debt" would have arisen. Appellant's convictions do not relate to his failure to pay a "debt;" his convictions relate to his failure to pay over funds collected and file returns. As a result, any interpretation of Article I, §10 of the United States

Constitution simply does not come into play.

Even if Article I, §10 were relevant to Appellant's challenge, his interpretation is so frivolous as to warrant either dismissal of the appeal or affirmance of the state court judgment. Courts have unanimously interpreted Article I, §10 of the United States Constitution as a restriction on the state's power to adopt its own currency, not on the Congress' ability to adopt federal reserve notes as legal tender. See Julliard v. Greenman, 110 U.S. 421 (1884); Radue v. Zanaty, 308 S.2d 242 (Ala. 1975); Allen v. Craig, 564 P.2d 552 (Kan. App. 1977); People v. Lawrence, 333 N.W.2d 525 (Mich. App. 1983); Chermack v. Bjornson, 223 N.W.2d 659, (Minn. 1974), cert. denied, 421 U.S. 914 (1975); Dorgan v. Kouba, 274 N.W.2d 167 (N.D. 1978); Leitch v. State Department of Revenue, 519 P.2d 1045 (Ore. App. 1974); City of Colton v. Corbly, 323 N.W.2d 138 (S.D. 1982). There being no restriction on the United States Congress, federal reserve notes have been held validly to constitute taxable dollars.

United States v. Rifen, 577 F.2d 1111 (8th Cir. 1978); United States v. Daly, 481 F.2d 28 (8th Cir. 1973), cert. denied, 414 U.S. 1064 (1973). These decisions are in conformity with this Court's legal tender cases, see Julliard v. Greenman, supra, and re-examination of Article I, §10 of the United States Constitution is not required. As a result, even if the question was properly presented to the State court, the appeal should be dismissed for want of a substantial federal question. In the alternative, the law being clear, the decision of the State court should be affirmed without further briefing or argument.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that the appeal from the Court of Special Appeals of Maryland be dismissed

or, in the alternative, that the decision of the state court be affirmed without further briefing or argument.

Respectfully submitted,

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